No. 82-579

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

COUNTY OF MONROE, STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT COUNTY OF MONROE

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QUESTIONS PRESENTED

1. Whether 18 USC, Section 3195, of the Federal Extradition Act creates a federal cause of action against the demanding authority for the expenses of extradition.

2. Whether by invoking the Federal Extradition Act the state waives its Eleventh Amendment immunity and is subject to suit by a political subdivision of another state.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLES OF CONFEDERATION 1777, ARTICLE IV:

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from justice, and be found in any of the United States, he shall upon demand of the governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 1:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

UNITED STATES CONSTITUTION, ARTICLE IV, SECTION 2, CLAUSE 2:

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

UNITED STATES CONSTITUTION, AMENDMENT ELEVEN:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

NEW YORK STATE CRIMINAL PROCEDURE LAW

Sec. 570.06 Fugitives from justice; duty of governor

Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

Sec. 570.18 Issuance of warrant of arrest by governor; recitals therein

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any police officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

Section 570.28. Confinement of the Accused in Jail when Necessary.

The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

Section 827 of the Code of Criminal Procedure

Section 827. (Amended 1886). To be delivered up by the governor on demand of the executive authority of the state or territory from which they have fled. — It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county or his under sheriff, or in the cities of this state (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the governor's warrant must, within

thirty days from its date, unless sooner requested, return the same and make return to the governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must, upon request of the governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

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STATE OF FLORIDA,

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COUNTY OF MONROE, STATE OF NEW YORK,

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On Petition for a Writ of Certiorari
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Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT COUNTY OF MONROE

The respondent, County of Monroe, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the en banc judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 4, 1982. That decision is reported at 678 F.2d 1124.

STATEMENT OF THE CASE

On September 14, 1977 the Honorable Ruben O'D Askew, Governor of the State of Florida, signed and properly executed a demand for the extradition of one Jerry Michael Davis who was wanted in Metropolitan Dade County, State of Florida. The demand for the extradition was based on a request by the Sheriff of Dade County.

Governor Askew's extradition request was forwarded to Governor Carey of the State of New York and on October 3, 1977 Governor Carey executed a warrant addressed to the Sheriff of the County of Monroe in which the Sheriff was requested to apprehend Jerry Michael Davis and deliver him to Sergeant Reincke of Miami, Florida.

On November 2, 1977 Jerry Michael Davis was apprehended by the Rochester Police Department and based on the extradition warrant outstanding against him was placed in the custody of the Sheriff of the County of Monroe.

On November 8, 1977, while in the custody of the Sheriff, Jerry Michael Davis became seriously ill, was taken to Rochester General Hospital, where he underwent major surgery. He stayed in the hospital until December 21, 1977 when he was returned to the Monroe County Jail and on February 3, 1978 was finally turned over to the Florida authorities.

While in the hospital, Mr. Davis was placed in a private room under twenty-four hour guard.

The County of Monroe was obligated to pay the hospital for the care and treatment of Mr. Davis the amount of $7,841.85, as the sheriff and the County are responsible for the cost of all medical care for prisoners in the sheriff's custody. 24 Opinions State Comptroller 356 (1968); Opinions of Attorney General (informal) of March 22, 1967. In addition, the County of

Monroe sustained special costs of $7,747.14 for providing guards twenty-four hours a day at the hospital.

The County of Monroe requested the State of New York and the State of Florida as well as Metropolitan Dade County to pay the extradition costs and expenses incurred by the County of Monroe for Jerry Michael Davis' medical care and the cost of guarding him in the hospital. No request was made for the cost of room and board provided Mr. Davis for the period he was in the custody of the Sheriff.

The State of Florida, State of New York and Metropolitan Dade County all refused to pay the costs incurred by the County of Monroe.

Thereafter, the County of Monroe commenced an action against the State of New York, the State of Florida and Metropolitan Dade County, Florida, in the United States District Court for the Western District of New York to recover the amount of $15,588.99 expended by it. The County of Monroe invoked Federal jurisdiction under 18 USC Section 3195, diversity of citizenship, with the amount in controversy being over $10,000. Upon motions of the State of New York and the State of Florida the late Judge Harold P. Burke of the United States District Court dismissed the County's claim against the two states for failure to state a claim and for lack of personal jurisdiction over the State of Florida. The County appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed that portion of the decision which dismissed the claim against the State of New York and reversed and remanded that portion of the decision which dismissed the action against the State of Florida. The State of Florida moved for a rehearing en banc and its petition was denied on August 3, 1982. The State of Florida then filed this petition for writ of certiorari to the United States Court of Appeals, Second Circuit.

SUMMARY OF ARGUMENTS

1. 18 USC Section 3195 Creates a Federal Cause of Action Against the State of Florida by the County of Monroe.

When applying the factors established by *Cort* v. *Ash*, 422 US 66 (1975) and subsequent decisions to this case in determining whether the 18 USC §3195 implies a federal cause of action, it is clear that this case is squarely on all points with the *Cort* v. *Ash* criteria.

2. The Cause of Action is Not Barred by the Eleventh Amendment Immunity.

Two questions are before this court. One is whether the County of Monroe is a citizen for purpose of the Eleventh Amendment when it is a plaintiff in a case resulting from a governmental act it performs pursuant to a Federal Act.

The County maintains that it is not and that the Eleventh Amendment does not bar its lawsuit.

Secondly, if the court decides that the County is a citizen then it contends that Florida waived its immunity when it invoked the Federal Extradition Act, in particular since Florida admits that it knew it may be liable for payment of costs of extradition when it invoked the Act.

ARGUMENTS WHY THE WRIT SHOULD BE DENIED.

1. THE FEDERAL EXTRADITION ACT, (HEREINAFTER REFERRED TO AS "ACT"), 18 USC SECTION 3195 CREATES A FEDERAL CAUSE OF ACTION AGAINST THE STATE OF FLORIDA.

In order to determine this action two questions must be answered. First, does 18 USC Section 3195 create a federal cause of action against the demanding authority; and, second, whether such action is barred by the Eleventh Amendment to the Constitution of the United States.

Section 3195 does not expressly provide for a cause of action but merely states:

> "All costs or expenses incurred in any extradition proceeding in apprehending, securing and transmitting a fugitive shall be paid by the demanding authority. . ."

The majority opinion of the Second Circuit found that a cause of action may be implied under the standards announced in *Cort* v. *Ash*, 422 US 66 (1975); *Cannon* v. *University of Chicago*, 441 US 677 (1979); *Touche Ross and Co.* v. *Redington*, 442 US 560 (1979), and others (A.10)*. In *Cort* v. *Ash*, 422 US 66, the court set out four criteria which must be determined when deciding whether a private remedy is implicit in a statute which does not expressly provide such remedy. The court stated at page 78:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First is the plaintiff one of the class for whose benefit the statute was enacted — that is does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent explicit or implicit either to create such a remedy or to deny one. Third, is it consistent with the underlying purposes of the legislative scheme to impute such a remedy for the plaintiff and finally, is the cause of action one traditionally relegated to state law in an area basically the concern of the state, so that it will be inappropriate to infer a cause of action based only on federal law."

There is no question that this case falls on all points within the four criteria expressed by the court.

The County of Monroe is one of the class for whose benefit this statute was enacted.

Section 3195 of the Act specifically states that the demanding authority shall pay all expenses incurred in extradition. The statute is silent as to whom such payment is to be made.

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*The numbers in parenthesis refer to the page number in the appendix.

Florida, while admitting that Section 3195 creates a cause of action (Petition, pages 8 & 10), argues that Congress intended that payment would be made and an obligation would be incurred only to the asylum state. The statute, however, does not say that. As the majority of the Second Circuit stated (A.24), had Congress intended to limit such payment to the state, Congress could have added the words "all expenses of extradition incurred by any state in any extradition proceeding . . . shall be paid by the demanding state." There is no doubt that Congress contemplated that the actual apprehension, securing and transmitting of a fugitive will not be done by the executive authority of the state but that such apprehension and extradition shall be carried out by political subdivisions of the state.

Section 3182 of the Act states that whenever the executive authority of any state demands any person as a fugitive from justice of the executive authority of any state, the executive authority of the state to which such person has fled "shall cause him to be arrested and secured . . . and shall cause the fugitive to be delivered to such agent when he shall appear." The statute is silent as to who shall be caused by the executive authority, to have the fugitive arrested and secured, and the statute is rightfully so silent as this is left to the states themselves to legislate. In New York State, Section 827 of the Code of Criminal Procedure (as amended in 1886) mandated that the Governor request the sheriff to apprehend such fugitive. This changed and under Section 570.18 of the New York Criminal Procedure Law the "Governor shall direct the warrant to any police office or any person he deems fit to execute the warrant." The Criminal Procedure Law further grants peace officer status to any person who is entrusted with the execution of the warrant. It is, therefore, clear that Congress, when enacting the extradition act recognized that the executive authority will not necessarily be the authority executing the warrant and that the expenses incurred in the apprehension of the fugitive will not

necessarily be incurred by the executive authority but will be incurred by the sheriff or by a political subdivision of the state, and, therefore, legislated the financial obligations of the demanding authority only.

Florida argues that because all sections of the Act, with the exception of Section 3195, refer to the executive authority of the state, Section 3195 should be read to mean that the demanding state owes its obligation to pay only to those executive authorities involved in the extradition process. But, the fact that all other sections of the act specifically mention the "executive authority" and such mention was omitted from Section 3195 serves to support the argument that Congress had a reason for not including the words "executive authority" in Section 3195 and that such omission was deliberate, recognizing that the costs will be incurred by entities other than the executive authority and thus intended to make the obligation to pay to the entity which incurred the expenses. To decide otherwise would leave the political subdivisions of the state, such as the County of Monroe, without any remedy at law.

The dissent in the Second Circuit held that the State of New York could be made to pay the costs or sue the State of Florida (A.58). However, there is no statute which authorizes the State of New York to make any payment for costs of extradition, and without authorizing legislation the courts are powerless to compel the state to expend funds, "nor under the State Constitution may the courts of this state arrogate the power to appropriate and provide funds." *In the Matter of the Petitions of Rhonda Smiley and Betty Monroe,* 36 NY2d 433.

Furthermore, even if the County of Monroe took the State of New York to court by way of Writ of Mandamus it would have no legal basis under which the court could compel the State of New York to bring an action against the State of Florida in the U.S. Supreme Court or compel it to pay. Thus, if the state

decides that it does not wish to get involved in litigation, and its interests are different from those of the County of Monroe, the county would be without any remedy to enforce Section 3195 of the Act and to collect the funds it expended from the State of Florida, or compel the State of New York to bring an action against the State of Florida.

It has also been suggested by the dissent in the Second Circuit that the County of Monroe could have transferred the fugitive to a state institution (A.6). However, Section 570.28 of the Criminal Procedure Law permits only that such fugitive be housed in a county or city jail and mandates the keeper of such jail to accept such prisoner. There is no discretion with the sheriff or county in charge of the county jail or with a police officer in charge of the city jail to refuse to accept such fugitive and there is no authority in the Criminal Procedure Law to transfer such fugitive to the state for safekeeping.

It is thus clear that the County of Monroe has only one remedy when it wishes to collect the amounts of money expended by it out of its citizens' tax dollars, and that is to bring an action in federal court against the State of Florida. The court stated in *Cannon* v. *University of Chicago*, 441 US 677 at page 706:

> "Private remedy is consistent with and in some cases even necessary to the orderly enforcement of the statute."

And, at a footnote at page 707 Id., the court said:

> "True, this court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available. But, it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute." (Citations omitted)

It is, therefore, clear that in this case, where the statute confers a benefit and where the County of Monroe has no other remedy, and where the only enforcement of the statute is by implying a private cause of action under Section 3195, that the Second Circuit was correct in finding that Section 3195 does imply a cause of action in favor of the County of Monroe, and the first factor under *Cort* v. *Ash*, 422 US 66 is met.

The second criterion under *Cort* vs. *Ash*, 422 US 66 is whether there is any indication of legislative intent explicit or implicit to create such a remedy or to deny one. The majority in the Second Circuit held that by specifically providing that the demanding authority shall be liable for costs, Section 3195 by its terms contemplates that a claim may be asserted against a state by the party incurring the costs necessitated by compliance with the demand (A.24).

The Constitution of the United States, Article III, Section 2, states in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, . . . to controversies between two or more states; between a state and citizens of another state; . . ."

Even though a great deal of debate was held at the time of the adoption of the constitution as to the right to assert a claim against a state by a citizen of another state, and despite the fears that persisted at the time, this Article of the Constitution was nevertheless adopted, and was indeed interpreted by the Supreme Court in the case of *Chisholm* v. *Georgia*, 2 Dall. 419 (1793) that federal jurisdiction encompassed a suit brought against a nonconsenting state by citizens of another state. It was also in 1793 that Congress passed the Federal Extradition Act, several years before the Eleventh Amendment to the Constitution was adopted. At that time it was clear that

lawsuits between a state and citizens of another state were permitted. The dissent in *Chisholm* v. *Georgia*, 2 Dall. 419, elaborated on the intent of Congress in passing Article III, Section 2, of the Constitution. Justice Iredell dissented in the *Chisholm* case, and his view on the intent of Congress in adopting that article of the Constitution was adopted by the court in the case of *Hans* v. *Louisiana*, 134 US 1 (1889) at page 12, where Justice Bradley stated (discussing the Chisholm decision):

> "Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals (which he conclusively showed was never done before,) but, only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts."

And Judge Bradley continued and stated that under all of the circumstances surrounding the Chisholm decision the court was at liberty to adopt the dissent's view in the Chisholm case, p 18 id.

Justice Iredell's view clearly indicates that where Congress thought appropriate to vest federal courts with jurisdiction to hear and determine controversies between the parties designated in Article III, Section two of the Constitution the courts had the jurisdiction to hear such controversies and, therefore, when Congress passed the Federal Extradition Act in 1793 and stated in Section 3195 that the demanding authority shall be liable for all expenses it certainly contemplated the possibility that lawsuits would be brought against the demanding authority, by either a state, county or a citizen who incurred the expense, and that such actions would be litigated. Thus, the second criterion of *Cort* v. *Ash*, supra, is also complied with in our case.

The third criterion is whether the implied remedy is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

The purpose of extradition is to provide a procedure whereby states can promptly aid one another in bringing to trial persons accused of crimes by preventing them from finding asylum in another state. The Supreme Court in the case of *Biddinger* v. *Commissioner of Police of City of New York*, 245 US 128 (1917) stated at page 129:

> "(t)he provision of the Federal Constitution quoted (Article IV, Section 2), with the change of only two words, first appeared in the Articles of Confederation of 1781, where it was used to describe and continue in effect the practice of the New England colonies with respect to the extradition of criminals. The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crimes by preventing their finding in one state an asylum against the process of justice of another."

For this purpose Congress passed the Federal Extradition Act, and as the majority in the Second Circuit stated the provisions of Section 3195 are consistent with the strong federal interest in ensuring cooperation among the states and such cooperation is necessary to effectuate that goal.

As the Second Circuit stated (A. 19), if entities such as the County of Monroe know that they cannot recover expenses incurred by them in complying with an extradition demand, the county might delay, suspend or otherwise fail to comply with the demand, thus frustrating the federal interest in speedy extradition.

The fourth criterion cited by *Cort* v. *Ash*, supra, is whether the cause of action was one traditionally relegated to state law in an area basically the concern of the state or whether it was a cause of action based only on federal law.

Ever since the adoption of the Constitution and the enactment of the Federal Extradition Act in 1793, and even prior to that, the Articles of the Confederation, extradition has been a matter of federal and not state law.

Article IV, Section 2, Clause 2 states:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Congress, recognizing that this provision was not self-executing passed the Federal Extradition Act which established procedures for enforcing the language of Article IV, Clause 2 of the Constitution.

Extradition between states, territories and countries, subject to the jurisdiction of the United States depends solely on the provisions of the Constitution of the United States and the acts of Congress. There is no reserve power in the state to surrender a fugitive as a matter of favor or comity. *Corkran* v. *Hyatt*, 172 NY 183 aff'd 188 US 691.

Thus it is clear that all four components required by the court in *Cort* v. *Ash*, 422 US 66 (supra) have been met in this case and a private cause of action does exist under Section 3195.

2. THE CAUSE OF ACTION IS NOT BARRED BY THE ELEVENTH AMENDMENT IMMUNITY.

The second obstacle in the way to recovery by the County of Monroe against the State of Florida is the question of whether the Eleventh Amendment immunity bars the cause of action against the State of Florida.

The Eleventh Amendment provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

In determining whether the Eleventh Amendment bars the County's action against the State, two questions must be answered. One, whether the County of Monroe is considered a citizen for the Eleventh Amendment purpose, when it sues a state as a result of the performance of a governmental duty imposed on it by a Federal Act, and thus is barred from bringing an action against the state and, two, if this question is answered in the affirmative, whether the State of Florida waived its immunity by invoking the Extradition Act.

It is the position of the County of Monroe that it should not be considered a citizen as stated in the Eleventh Amendment to the Constitution of the United States, when it is a plaintiff in an action against a state resulting from the performance of a governmental duty imposed on it by Federal Act.

There is no question today that a county may be sued in federal court and the immunity of the Eleventh Amendment does not apply to a county thus distinguishing it from the state. However, neither can the county be considered a citizen as it performs governmental acts, it governs its citizens, and its revenues are derived from tax dollars. A county should also be

distinguished from a city, village or town as it is not merely a municipal corporation, but also a political subdivision of a state. But, even if it is not distinguished from a city, the court in the case of *New Jersey* v. *New York,* 345 US 369 decided that a city is barred from suing a state when the state in which the city is located is already a party to a lawsuit, and the city did not show a compelling interest in its own right to be a litigant. Thus indicating that if the state is not involved and the city has a compelling interest it would be permitted to bring an action against a state. The Court did permit the City of New York to be a party to that suit.

If we follow the rationale of the court in that case, it is clear that the County of Monroe has a compelling interest in its own right to be a litigant in this case against the State of Florida. The County's interest arises out of its performance of a duty imposed upon it by federal statute. The duty was a purely governmental act and the County of Monroe and its citizens did not in any way benefit from the performance of such act and the only beneficiaries were the State of Florida, Metropolitan Dade County and their residents, nor has the County of Monroe any other remedy, but to enforce 18 USC Section 3195.

The Eleventh Amendment was adopted so that no public funds be expended by the state where they were not previously appropriated, and so that a state will not be faced with a large expenditure without being on notice that it is liable for such.

If, however, the Eleventh Amendment is made to apply in this case, a great injustice shall befall the citizens of the County of Monroe. Just like the State of Florida, the County of Monroe, whose revenue is derived from taxing its citizens, has not appropriated any funds from which these exceptional costs incurred by it can be paid, and the county shall have to tax its citizens to obtain the funds for performing a duty for the benefit of the State of Florida and its residents and from which the taxpayers of the County of Monroe do not benefit.

It is inconceivable that Congress intended to protect citizens

of one state from improper taxation for a service from which they alone benefit at the cost and expense of citizens of another state or political subdivision where the citizens will be improperly taxed for a service from which they do not benefit, and which they did not elect to provide but which was imposed upon them by the Congress of the United States.

Florida argues that if the court permits lawsuits by political subdivisions, states would be inundated with lawsuits by "some unknown political subdivisions" (P. 22 of Petition.) Florida further argues that no state believed that the system of Governor to Governor request would be "short-circuited" and expose it to liability to a political subdivision. But, the Eleventh Amendment intends to protect the state from being compelled to make payments without the proper appropriations especially when the state had no notice that such expenses would be incurred. When the state has notice of such expense, it makes no difference to whom the payment is made, as long as the state knew that it would have to make such payment. Florida in its brief acknowledges that it had notice that it may be liable for such expenses, (P. 23 of Petition) and whether the County of Monroe or the State of New York incurred the costs of extradition, such costs are the obligation of the State of Florida and there is no question that the statute clearly places such obligation on the State. However, the State of Florida never offered to honor its obligation, and is attempting to avoid the obligation imposed on it by Congress. Surely Congress never intended to permit the states to shirk their obligations under Section 3195 of the Act, only because the expenses were incurred by a county and not by a state.

Florida also argues that it had no free choice in this case, as when it wanted a fugitive, it had to comply with the Act (P. 22-23 of Petition). That is correct, and once Florida admits that it must comply with the Act, it admits that it must comply with Section 3195 of that Act which imposes payment of costs on the State of Florida. Thus, Florida admits that it has an obligation to pay the costs, yet it refuses to do so. The State of Florida

does not argue that the costs have not been incurred or that they are excessive. The sole argument which Florida raises is that it is not obligated to pay the costs to the party which incurred them. Florida, as stated above, admits that it was on notice that it may be required to pay the expenses involved in extradition (p. 23 of the petition), but argues that such notice extended only "to the claims put forth by the party obligated to return the fugitive," namely, the executive authority of the extraditing state. But, once Florida had notice that it may be required to pay the expenses involved in the extradition, what difference can the payee make, as long as the notice to the state existed? Therefore, this case is distinguished from *Edelman* v. *Jordan*, 415 US 651 (1971) and *Employees* v. *Missouri Public Health Dept.*, 411 US 279 (1973), where the state had no notice.

Furthermore, the language of Section 3182 belies the argument that the notice applies only to a state claim. Section 3182 specifically states that the governor *shall cause* the fugitive to be arrested. Obviously, the statute did not contemplate the governor sending the state guard or a state army in search of the fugitive, but clearly contemplated that the governor will delegate this matter to the appropriate political subdivision which would apprehend, and house the fugitive pursuant to its laws, incur the expenses and will have a claim against the demanding authority.

Interestingly enough, the Attorney General of the State of Florida has expressed the opinion that a Florida county may, under 18 USC Sec. 3195 charge the demanding authority of another state for services performed in arresting and keeping a fugitive in connection with extradition proceedings instituted to procure his removal from Florida to that state. Florida Attorney General Opinions 1959-1960, Opinion 059-177, pages 256-66. This official state opinion is inconsistent with the position of the Attorney General in this case. If Florida, itself,

recognizes that its own political subdivisions may bring claims against the demanding authorities of another state, or their subdivisions, for expenses incurred in connection with extradition proceedings, how can it turn around now and claim that no such cause of action exists? There is no question that the State of New York does not prohibit lawsuits by political subdivisions against another state or county. In an informal opinion of the Attorney General of the State of New York, Informal Opinions, 1971, pages 152, 153, the Attorney General stated that Onondaga County may bring an action for costs and expenses against the demanding county and that the demanding county should honor such a request. It appears, therefore, that there is no prohibition by the State of New York against a political subdivision pursuing its own remedies, and correspondingly the State of Florida permits the same remedy for its own political subdivisions. The conclusion, therefore, is that the states contemplate that the extraditing counties would be the ones to sustain the expenses and should be the ones to recover their expenses.

The second question which should be determined, if the court decides that the Eleventh Amendment applies, is whether the State of Florida waived its immunity.

Florida agrees that if the immunity is waived it may be sued in federal court and that Congress has the power to abrogate the immunity (p. 10 of petition).

The question of a state's waiver of its immunity has been the subject of much litigation and such waiver is determined based upon the facts of each case. The court in *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 US 184 (1964), 196 stated:

> "A state's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this court.

> But, when a state leaves this sphere that is exclusively its own and enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." (Citations omitted).

Based on those words, the court decided that the State of Alabama was subject to lawsuits by citizens.

Florida relies on the case of *Employees* v. *Missouri Public Health Dept.*, 411 US 279 (1973), supra, where the court refused to find a clear indication that a waiver was created by Congress as the state's obligation was enforceable in an action which was not subject to a defense of the Eleventh Amendment.

Our case is easily distinguishable from the *Missouri Public Health* case. There, Section 16(c) of the Fair Labor Standards Act (FLSA) of 1938, gave the Secretary of Labor the right to sue on behalf of the employees and the employees' right to sue was terminated when the Secretary brought such action. The employees, therefore, could compel the Secretary of State to commence an action on their behalf. In our case, there is no statute which authorizes the State of New York to commence an action on behalf of the County of Monroe nor is there a statute which permits the County of Monroe to demand that the State of New York pay any expenses incurred by the County of Monroe for the cost of extradition. Therefore, unlike *Missouri Public Health Department* case the County of Monroe has no other remedy and it is powerless to compel the State of New York to take any action. In *Parden* v. *Terminal Railway*, 377 US 184, (supra), the court concluded that it would be "surprising" to learn that Congress had made state railroads liable to employees under the FELA, yet provided "no means by which that liability may be enforced."

But, even if Section 3195 does not expressly or impliedly abrogate the constitutional immunity, Florida had voluntarily waived its own immunity when it invoked the Federal Extradition Act.

The State of Florida relies on the dissent in saying that each state should decide whether the expenses of a political subdivision ought to precipitate litigation with a sister state.

But, the State of New York has no interest in recouping the expenses which were not expended by it nor has it volunteered at any time to ask the State of Florida to pay such expenses. The State of New York has already determined as did the executive authority of the State of Florida through their Attorney Generals' opinions that political subdivisions can sue for extradition expenses. Inasmuch as the County of Monroe has no legal basis under which it could take New York State to court to compel it to reimburse the County of Monroe, the state has no interest in the outcome of any litigation between the demanding authority and the county which expended the funds.

A state may waive its Eleventh Amendment immunity by consenting to a suit that would otherwise be barred. *Clark* v. *Barnard,* 108 US 436, 447. In the absence of express consent, the courts have recognized that certain state conduct may constitute a waiver or a constructive consent to suit. However, the evidence of such implied waiver or consent must be strong and "the mere fact that a state participated in a program through which the federal government provides assistance for the operation by the state of a system of public aid is not sufficient to establish consent on the part of the state to be sued in federal court." *Edelman* v. *Jordan,* 415 US 651 at 673.

There is no question that the Federal Extradition Act does not expressly abrogate the state's Eleventh Amendment immunity as it preceded such amendment and at that time actions

between citizens of a state and a state were permissible. *Chisholm* v. *Georgia,* 2 Dall. 419 (1793) supra. But, this case is readily distinguishable from *Employees* and *Edelman* where the court found that Congress had totally failed to address the issue of state liability. In our case the plain language of Section 3195 clearly indicates an intent by Congress to require the demanding state to pay all expenses of extradition. Section 3195 is not a part of an intricate regulatory scheme offering alternative means of obtaining relief as was the case in *Hutto* v. *Finney,* 437 US 678 (1978). Furthermore, in this case, Florida is not participating in some program where federal funds are involved and which is ongoing for a long period of time and where participation such as contemplated in *Edelman* would involve a blanket waiver of the Eleventh Amendment and subject the state to suit by millions of individuals. Nor is the State of Florida faced by the choice of abandoning a program or not entering a business so as to protect its immunity. The issue in this case is very narrow, Florida voluntarily, and knowing, (as it admitted) that it will be subject to payment of costs of extradition (whether to the State of New York or to the County of Monroe is irrelevant as long as it knew that it would be subjected to such costs), chose to invoke the Federal Extradition Act. Florida could choose not to demand extradition, as it had done on other occasions. However, Florida cannot choose to invoke one part of the Act and to disregard the other parts thereof. In this case, a small cost of extradition is involved and a one time waiver of immunity. This Act is invoked at Florida's will, and it may pick and choose situations where it will seek extradition thus limiting its liability. In this case, Florida was the only party which had any choice at all in the matter. Under 18 USC, Section 3182, and Section 570.06 of the New York Criminal Procedure Law, New York had no discretion as to whether or not to honor the demand by Florida while Monroe

County had no choice but to honor the warrant issued by Governor Carey. Had Monroe County refused to honor the warrant the state could compel it to honor it. The majority opinion is correct in stating that there is a strong interest in having states live up to their obligations under the statute (A. 50). The Constitution and the Extradition Act contemplated a cooperative arrangement among the states to expedite this procedure. It contemplated that the demanding state would pay the costs incurred. The State of Florida admits that it knew it would have to make payment. It is hard to believe that the Congress ever intended a state to avoid its obligations by claiming that it is obligated to pay only to the state but not to a political subdivision of a state which incurred the expenses of extradition, as is alleged by Florida.

The dissent states that because Section 3182 refers only to the executive authorities of the demanding state and extraditing state respectively, the costs are between the executive authority of one state and the executive authority of another state. However, Section 3195 does not refer to the extraditing state and the statute specifically states that all the executive authority of the asylum state has to do is *cause* the person to be arrested and delivered to the agent of the demanding state. There is nothing in the statute that says that the executive authority of the asylum state is the one which has to deliver the fugitive and arrest the fugitive itself, therefore, the statute clearly contemplates that such matter be delegated and the expenses be incurred by the entity to which the responsibility was delegated. Thus, when Florida invoked the Act, knowing that it may be charged with costs, it waived its immunity from suit and consented to an action to enforce 18 USC Section 3195 if it failed to comply with it voluntarily.

CONCLUSION

The question of whether 18 USC Section 3195 permits a direct cause of action against the state relates to the question of implied cause of action which had been dealt with many times before by the Supreme Court, as was the question of whether the state waived its immunity, and each such case was decided based on its own specific facts.

The Second Circuit's decision does not change the law nor does it enter into a new era. It limits its opinion to the narrow sphere of the consequences when a state invokes the Federal Extradition Act, and refuses to pay the costs of extradition. Fortunately, it appears that such problems rarely arise and thus the question before the court is not of such magnitude which would warrant review by the court.

Based on the above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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